In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1148

HOYT C. CUPP, Superintendent,
Oregon State Penitentiary,

Petitioner,

v.

HUGH KYLE NAUGHTEN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INDEX

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Feb. 8, 1971—Naughten's petition for writ of habeas corpus filed in U.S. District Court for the District of Oregon.

Feb. 26, 1971—Cupp's return and motion to dismiss filed.

June 30, 1971—Parties waived an evidentiary hearing and agreed to submit the case on written briefs.

Nov. 4, 1971—Opinion and judgment order of District Court entered, dismissing petition.

Nov. 24, 1971—Naughten's notice of appeal filed.

May 24, 1972—Opinion and judgment of U.S. Court of Appeals for the Ninth Circuit entered, reversing District Court.

June 6, 1972—Cupp's petition for rehearing filed.

Jan. 18, 1973—Order on petition for rehearing entered, amending original opinion and denying petition for rehearing.

Feb. 20, 1973—Cupp's petition for writ of certiorari filed.

Feb. 26, 1973—Separate dissenting opinion of Chambers, C. J., filed.

April 23, 1973—Certiorari granted.

CAPTION OF THE CASE

The original petition for a writ of habeas corpus was filed in forma pauperis. The caption of the case, as ultimately fixed by the District Court, was as follows:

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

HUGH KYLE NAUGHTEN,	)	
	)	
Petitioner,	)	
	)	
v.	)	Civil No. 71-80
	)	
HOYT C. CUPP, Superintendent, Oregon State Penitentiary,	)	
	)	
	)	
Respondent.	)	

PETITION FOR WRIT OF HABEAS CORPUS

[Petition filed on form questionnaire in use in District Court. Instructions for completing omitted in printing.]

PETITION FOR WRIT OF HABEAS CORPUS
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

HUGH KYLE NAUGHTEN O.S.P. # 33774
Full name and prison number (if any) of Petitioner

v.

STATE OF OREGON
Name of Respondent

Case No. Civ. 71-80

1. Place of detention—Oregon State Penitentiary
2. Name and location of court which imposed sentence —Circuit Court, Multnomah County, Portland, Oregon
3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed: unknown
4. The date upon which sentence was imposed and the terms of the sentence: 15 years in O.S.P.—Sentenced May, 1969
5. [Finding of guilty was made after a plea of not guilty]
6. [Finding of guilty was made by a jury]
7. Did you appeal from the judgment of conviction or the imposition of sentence? Yes

8. If you answered "yes" to (7), list

(a) the name of each court to which you appealed:

i. Oregon State Court of Appeals

ii. Petitioned Ore. State Supreme Court for review

(b) the result in each such court to which you appealed:

i. Appeal denied (verdict of Circuit Court affirmed)

ii. Petition denied

(c) the date of each such result

i. July 9, 1970

ii. October 16, 1970[1]

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. State v. Kessler, 89 Adv Sh 55, — Or —, 458 P2d 432 (1969); State v. Blank, 90 Adv Sh 285, — Or App —, 464 P2d 836 (1970)

9. If you answered "no" to (7), state your reasons for not so appealing: X

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) The circuit court erred in instructing the jury that every witness is presumed to speak the truth without an explanation of how this presumption can be overcome (when defendant does not take the stand or offer witnesses). An accused's presumption of innocence is negated if he calls no witnesses in his defense and the trial court instructs the jury that all witnesses are presumed to speak the truth

[1] Actually, petition for review was denied by Oregon Supreme Court on September 22, 1970.

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) State v. Cathey, — Or App —, 89 Or Adv Sh 843, — Or —, — P2d — (1969)

State v. Kessler, — Or —, 458 P2d 432 (1969)

State v. Smith, — Or App —, 89 Or Adv Sh 185, — Or —, — P2d — (1969)

United States v. Bilotti, 380 F2d 649 (2nd Cir 1967)

United States v. Boone, 401 F2d 659 (3rd Cir 1968)

United States v. Meisch, 370 F2d 768 (3rd Cir 1966)

ORS 44.370

12. Prior to this petition, have you filed with respect to this conviction

(a) any petition in a State court under the Oregon Post-Conviction Hearing Act. ORS 138.510 to 138.680? No

(b) any petition in State or Federal courts for habeas corpus? No

13. [Inapplicable and therefore omitted in printing.]

14. Has any ground set forth in (10) been previously presented to this or any other court, state or federal, in any petition, motion or application which you have filed? Yes

15. If you answered "yes" to (14), identify

(a) which grounds have been previously presented:

i. The same grounds as stated in question 10 (A)

(b) the proceedings in which each ground was raised:

i. Appeal to Oregon state court of appeals.

16. If any ground set forth in (10) has not previously been presented to any court, state or federal, set forth the ground and state concisely the reasons why such ground has not previously been presented: X

17. Were you represented by an attorney at any time during the course of
    (a) your arraignment and plea? Yes
    (b) your trial, if any? Yes
    (c) your sentencing? Yes
    (d) your appeal, if any? Yes
    (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? No

18. If you answered "yes" to one or more parts of (17), list
    (a) the name and address of each attorney who represented you:
        i. Mr. Roderick Kitson, Portland, Oregon
        ii. Mr. Oscar Howlett, Portland, Oregon
        iii. J. Marvin Kuhn, Deputy Public Defender 110 Industries Bldg., Salem, Oregon
    (b) the proceedings at which each attorney represented you:
        i. Plea
        ii. Trial & sentencing
        iii. Appeal

19. If you are seeking leave to proceed in forma pauperis, have you completed the sworn affidavit setting forth the required information (see instructions page 1 of this form)? Yes.

/s/ Hugh K. Naughten
Signature of Petitioner

[Jurat omitted in printing]

RETURN AND MOTION TO DISMISS

[Names of counsel omitted in printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

HUGH KYLE NAUGHTEN, Petitioner,	)	Civil No. 71-80
v.	)	RETURN AND MOTION TO DISMISS
HOYT C. CUPP, Superintendent, Oregon State Penitentiary, Respondent.	)	

Per order of the Court, dated February 8, 1971, that the respondent appear, state the cause of petitioner's detention, state whether or not petitioner's state remedies have been exhaused, and show cause why a Writ of Habeas Corpus should not issue, respondent states:

I

Hoyt C. Cupp should be substituted as the proper party respondent in the above-entitled case because he has the petitioner Hugh Kyle Naughten, in his custody pursuant to the following sentence orders:

1. From the Circuit Court of the State of Oregon for Multnomah County, dated May 6, 1969, on a verdict of guilty of Assault and Robbery Being Armed with a Dangerous Weapon, a 15-year sentence.

2. From the Circuit Court of the State of Oregon for the County of Marion, dated May 14, 1970, on a find-

ing of guilty of Burglary not in a Dwelling after trial without jury, a five-year sentence.

The aforesaid sentences have neither expired nor been terminated in any way. Copies of said sentence orders are attached hereto, marked Exhibits "1" and "2" respectively, and incorporated herein by this reference.

II

In his Petition for a Writ of Habeas Corpus, petitioner challenges only the conviction designated in the attached Exhibit 1. Petitioner's appeal from this conviction was affirmed July 9, 1970 by the Court of Appeals, as reported at 90 Or Adv Sh 1811, 471 P2d 830. Rehearing was denied August 4, 1970, and the Oregon Supreme Court denied review September 22, 1970. The ground petitioner seeks to raise herein was raised in said appeal and in the petition for review, and the petitioner cannot now raise it under the Oregon Post-Conviction Hearing Act. Therefore, petitioner has exhausted his remedies in the courts of the State of Oregon.

FOR ANSWER TO THE PETITION FOR A WRIT OF HABEAS CORPUS, RESPONDENT MOVES:

The Court for an order denying and dismissing the Petition for a Writ of Habeas Corpus for the reason that the petitioner was afforded a full and fair hearing on this issue in the state courts. The relevant constitutional principles were properly applied to undisputed facts, and all material facts were fully developed. Therefore, the criteria required by the United States Supreme Court

in *Townsend v. Sain*, 372 US 293 (1963), have been met. In support, respondent attaches copies of the relevant portion of the trial court transcript, and the opinion of the Court of Appeals of the State of Oregon as reported in 90 Or Adv Sh 1811, marked Exhibit "3" and Exhibit "4" respectively, and incorporated herein by this reference.

This motion is made pursuant to Rule 12 (b)(6) of the Federal Rules of Civil Procedure and 28 USCA § 2254 (a-c). Respondent will also rely upon the cases listed in petitioner's petition, most specifically on *United States v. Bilotti*, 380 F2d 649 (2d Cir), cert den 389 US 944 (1967).

LEE JOHNSON
Attorney General

/s/ Jim G. Russell
Assistant Attorney General
Attorneys for Respondent

[Exhibits "1", "2", "3" and "4" omitted in printing]

PRE-TRIAL STIPULATION

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

[By letter dated June 29, 1971, counsel for Naughten advised the clerk of the court that the parties stipulated that the trial transcript would be filed as an exhibit, that there would be no need for an evidentiary hearing, that oral argument was waived, and the case would be submitted on written briefs].

TRANSCRIPT OF NAUGHTEN'S STATE COURT TRIAL
(excerpt)

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH

THE STATE OF OREGON,	)	
	)	
Plaintiff,	)	No. C-51788
	)	
vs.	)	
	)	
HUGH KYLE NAUGHTEN,	)	
	)	
Defendant.	)	

TRANSCRIPT OF PROCEEDINGS

[March 26, 1969]

* * * * *

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MR. HOWLETT: Your Honor, the defendant will rest his case as well.

THE COURT: Do I have your Requested Instructions?

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MR. HOWLETT: No, your Honor, it is the same instructions that this Court usually gives.

THE COURT: Very well. You may proceed with your argument.

MR. BRUUN: Thank you, your Honor.

(Thereupon, closing arguments were made to the Court and the jury by counsel for the respec-

tive parties, after which the following further proceedings occurred:)

THE COURT: Ladies and gentlemen of the jury, if, during the course of these instructions, I do not speak loud enough for you to hear, don't hesitate to raise your hand, and I will attempt, despite my present affliction, to speak louder.

It is now the duty of the Court to instruct you as to the law.

The just determination of every legal controversy depends upon finding the true facts and applying to those facts the correct legal principles. Under our system of jurisprudence, the Court decides all questions of law and procedure arising during a

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trial, and it is the jury's duty to follow the Court's instructions in these matters. If the Court should make a mistake in the law, means exist by which it can be corrected.

On the other hand, the jury is the sole and exclusive judges of the facts and of the reliability to be given the testimony of any witness. Its findings as to the facts are final, and there is no procedure for correcting any mistakes it may make as to the facts. The jury's power, however, is not arbitrary; and if the Court instructs you as to the law on a particular subject or how to judge the evidence, you must follow such instructions. It is of the utmost importance, therefore, that in performing

your functions as jurors, you understand the instructions which I shall give to you.

In this case there has been an Indictment filed against the defendant in which the defendant is charged with the commission of the crime of Assault And Robbery Being Armed With A Dangerous Weapon, alleged to have been committed as follows:

"The said HUGH KYLE NAUGHTEN on or about the 17th day of August, A.D. 1968, in Multnomah County and State of Oregon, and being armed with a dangerous weapon, to-wit, a pistol, did commit an

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assault upon one James R. Livengood by threatening and menacing the said James R. Livengood with said dangerous weapon, and did unlawfully and feloniously take money of the United States of America from the person of the said James R. Livengood, and against his will, . . ."

You will have this Indictment with you in the jury room. The Indictment itself and the fact that an Indictment has been filed are not evidence. The Indictment is merely the formal statement of the charge.

To this Indictment the defendant has entered a plea of Not Guilty. The plea of Not Guilty is a denial of every material allegation contained in the Indictment.

The material allegations of the Indictment are as follows:

(1) That the defendant, Hugh Kyle Naughten, being armed with a dangerous weapon, to-wit, a pistol,

(2) Assaulted one James R. Livengood, and

(3) Took from the person of the said James R. Livengood, and against his will, money of the United States of America;

That the defendant at the time of the

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taking, if any, of the money had the intent to personally deprive the said James R. Livengood thereof, and

That the crime, if any, occurred on or about the 17th day of August, 1968, or within three years prior to the return date of the Indictment, which is October 25, 1968, and

That the crime, if any, took place or was triable in Multnomah County, Oregon.

The laws of the State of Oregon provide, and I quote from the statute:

"Any person being armed with a dangerous weapon who assaults another, and who robs, steals, or takes from the person assaulted any money or other property shall be punished as by law provided."

Robbery is the felonious taking of property, in this case money of the United States of America, from another by force. There must be actual taking and carrying away. Such actual taking and carrying away, being necessary to the robbery, is a part of the robbery, and while one engaged in the criminal enterprise is in the act of so carrying away, he is in the act of robbery.

There may be a completed robbery if there is any removal, however slight, of the money taken.

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The carrying away of the money which was the subject

of the robbery from the person of the party entitled to its possession is a necessary ingredient of the crime and is as much a part of the crime as the felonious taking or the violence.

In proving robbery of money, it is not necessary for the State to prove that any particular amount of money was taken. It is only necessary for the State to prove that in committing the robbery, some United States money was taken.

You may infer from the use of a pistol in the commission of the robbery that the pistol was loaded and was a dangerous weapon.

A "dangerous weapon" is a weapon by which death or serious bodily harm may be inflicted.

The amount of force to put the victim, James R. Livengood, in fear is not a necessary ingredient to the commission of the crime of robbery. Any force or display of force sufficient to accomplish the taking of the said money with the intent to deprive the said James R. Livengood permanently thereof is all that is required.

In reference to ownership of the money involved in this case, all the State has to prove is that the money allegedly carried away was in the

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possession of the said James R. Livengood.

The law provides for certain disputable presumptions which are to be considered as evidence.

A presumption is a deduction which the law expressly directs to be made from particular facts and is to be considered by you along with the other evidence.

However, since these presumptions are disputable presumptions only, they may be out-weighed or equaled by other evidence. Unless out-weighed or equaled, however, they are to be accepted by you as true.

The law presumes that the defendant is innocent, and this presumption follows the defendant until guilt is proved beyond a reasonable doubt.

Every witness is presumed to speak the truth. This presumption may be overcome by the manner in which the witness testifies, by the nature of his or her testimony, by evidence affecting his or her character, interest, or motives, by contradictory evidence, or by a presumption.

Burden of Proof. The burden is upon the State to prove the guilt of the defendant beyond a reasonable doubt.

Reasonable doubt means an honest uncertainty as to the guilt of the defendant. A reasonable

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doubt exists when, after careful and impartial consideration of all the evidence in the case, you do not feel convinced to a moral certainty that the defendant is guilty. Proof beyond a reasonable doubt is such as you would be willing to act upon in the most important of your own affairs.

Your verdict should be based only upon these instructions and upon the evidence in this case. It is your duty to weigh the evidence calmly and dispassionately and to decide the questions upon their merits. You are not to allow bias, sympathy, or prejudice any place in

your deliberations, for all parties are equal before the law. Neither are you to base your decisions on guesswork, conjecture, or speculation. Furthermore, you must not consider what sentence might be imposed upon the defendant.

In deciding this case you are to consider all of the evidence which you find worthy of belief presented by either party bearing on each question, regardless of which party has the burden of proof on that question.

A witness found to be intentionally false in a part of his or her testimony is to be distrusted in others. The term "witness" includes the parties.

You are not bound to find in conformity

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with the declarations of any number of witnesses which do not produce belief in your minds, as against the testimony of a less number or against a presumption or other evidence which does produce conviction in your minds. In other words, you are not necessarily to count the witnesses on each side, but you are to weigh the evidence.

Upon your return to the jury room, select some one of your number, man or woman, to act as foreman. Your foreman is to preside and to be spokesman. Then deliberate and find your verdict.

This being a criminal case, ten or more of your number must agree upon your verdict. When you have arrived at a verdict, the foreman will sign it upon the appropriate form.

You will have with you in the jury room, in addition to the Indictment and Exhibits in the case, two forms of

verdict, the first of which, omitting the title, reads as follows:

"We, the jury duly empaneled and sworn in the above-entitled court and cause, find the defendant, HUGH KYLE NAUGHTEN, GUILTY as charged in the indictment," and a line for your foreman to sign, which form of verdict you will use in the event your verdict is one of Guilty.

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The other form of verdict, omitting the title, reads as follows:

"We, the jury duly empaneled and sworn in the above-entitled court and cause, find the defendant, HUGH KYLE NAUGHTEN, NOT GUILTY," and a line for your foreman to sign, which form of verdict you will use in the event your verdict is one of Not Guilty.

Now, do the parties have any exceptions they care to take in Chambers out of the present of the jury?

MR. HOWLETT: Yes, your Honor.

(Thereupon, the Court, counsel, the defendant, and the reporter retired to Chambers, where the following occurred without the presence of the jury:)

MR. HOWLETT: First of all, I want to except to the instruction that every witness is presumed to speak the truth—I have been taking that exception—on the ground and for the reason that it denies the defendant the right to a presumption of innocence. They are doing that in the Federal Court, but the Oregon Supreme Court hasn't ruled on it yet.

THE COURT: You may have an exception.

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MR. HOWLETT: Now, then, there were several instructions, and I can't quote them because I can't write that fast, and they went along the line that regardless of the party—is there any way we could get your instructions so I could read it in the record? Could the Clerk get it?

(Thereupon, the instructions were furnished to counsel for the defendant.)

MR. HOWLETT: I take exception, your Honor, to the instruction which reads as follows: In deciding this case, you are to consider all of the evidence which you find worthy of belief presented by either party bearing on each question, regardless of which party has the burden of proof on that question.

I take exception for the reason that the defendant presented no evidence nor testified, himself, and it is a comment on the fact that the defendant failed to take the witness stand, and would leave the jury with the belief that the defendant had some burden.

THE COURT: I will correct that; you may have an exception.

MR. HOWLETT: And then where it says: A witness found to be intentionally false in a part of his or

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her testimony is to be distrusted in others. The term "witness" includes the parties.

And I would have to take exception to that on the

ground that it would be a comment on the failure of the defendant to take the witness stand, or it would leave the jury with the feeling that the defendant had some duty to take the witness stand or to present some evidence.

THE COURT: You may have an exception; I will correct it.

MR. HOWLETT: Then, under number of witnesses: You are not bound to find in conformity with the declarations of any number of witnesses which do not produce belief in your minds, as against the testimony of a less number or against a presumption or other evidence which does produce conviction in your minds. In other words, you are not necessarily to count the witnesses on each side, but you are to weigh the evidence.

And I would have to take exception because it would leave the jury with the idea that there was some burden on the defendant either to take the witness stand or to produce some evidence; and since he did not do so, I would feel it was prejudicial.

THE COURT: You may have an exception.

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MR. HOWLETT: I didn't prepare an instruction about the defendant not having the burden of—that he need not take the witness stand, and no inference of guilt should be considered upon his failure to do so, but if the Court would do it, —

THE COURT: Well, I don't know, with your supercritical attitude, I might—if you want to make a request, I will be glad to consider it.

MR. HOWLETT: I will request it, your Honor.

THE COURT: Well, in writing.

HR. HOWLETT: All right, I can write it down.

(Pause.)

THE COURT: Do you have any exceptions?

MR. BRUUN: No, I have no exceptions, your Honor. I haven't seen the instruction, though.

(Thereupon, the instruction was handed to counsel for the State.)

MR. BRUUN: Your Honor, isn't there a standard instruction for this?

THE COURT: There is.

MR. BRUUN: I have no objection.

THE COURT: I don't know whether you are entitled to it or not, but I have never known of a defendant that didn't take the stand where he wasn't convicted, so I don't think it makes any difference.

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(Thereupon, the Court, counsel, the defendant, and the reporter returned to the courtroom, where the following occurred within the presence of the jury:)

THE COURT: Ladies and gentlemen of the jury, the Court in its instructions referred to burden of proof, and that the party upon whom the burden rests had the burden of proof. Of course, the defendant's plea of Not Guilty puts at issue every material allegation, matter, and thing contained in the Indictment, and the presumption which belongs to the defendant and which

goes with the defendant to the jury room of being not guilty relieves the defendant of any obligation for any burden of proof upon any facet of the case. And you are instructed that the defendant need not take the witness stand, and you may not infer any evidence of guilt from his failure to do so.

You may swear the baliff.

(Thereupon, the Bailiff was sworn.)

THE COURT: You will accompany the Bailiff, ladies and gentlemen.

OPINION OF U.S. DISTRICT COURT

[Opinion set forth verbatim as Appendix B, pages 16-18 of the printed petition for writ of certiorari].

JUDGMENT ORDER OF U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

HUGH KYLE NAUGHTEN,	)	
	)	
Petitioner,	)	
	)	Civil No. 71-80
v.	)	JUDGMENT
	)	ORDER
HOYT C. CUPP, Superintendent, Oregon State Penitentiary,	)	
	)	
	)	
Respondent.	)	

Based upon the findings of fact and conclusions of law in the opinion of the Court entered this day, the petition for writ of habeas corpus is dismissed.

Dated this 4th day of November, 1971.

/s/ Gus J. Solomon
United States District Judge

OPINION OF U.S. COURT OF APPEALS

[Opinion set forth verbatim as Appendix C, pages 19-21 of the printed petition for writ of certiorari.]

JUDGMENT OF U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HUGH NAUGHTEN, Appellant,	)	
v.	)	No. 71-3065
HOYT C. CUPP, Superintendent, Oregon State Penitentiary, Appellee.	)	

APPEAL from the United States District Court for the District of Oregon.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and remanded.

Filed and entered May 24, 1972.

ORDER ON PETITION FOR REHEARING

[Order set forth verbatim as Appendix D, pages 22-23 of the printed petition for writ of certiorari.]

SEPARATE DISSENTING OPINION OF CHAMBERS, C. J.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HUGH NAUGHTEN,	)	
	)	
Petitioner-Appellant,	)	
	)	
v.	)	No. 71-3065
	)	
HOYT C. CUPP, Superintendent, Oregon State Penitentiary,	)	
	)	
Respondent-Appellee.	)	

[February 26, 1973]

Appeal from the United States District Court
for the District of Oregon

CHAMBERS, Circuit Judge, dissenting:

Naughten was charged with robbing a Quickie Mart drive-in grocery store in Portland, Oregon, on August 17, 1968. The evidence at trial consisted of the testimony of James R. Livengood, the proprietor of the store, the testimony of Larree E. Weissenfluh, a friend of Livengood who was in the store with Livengood, and the testimony of the officers who arrested Naughten and investigated the crime.

Livengood testified as follows:

The store closed at midnight. Around midnight on August 17, 1968, Livengood was in the store preparing the till change for the next morning. Livengood's friend

Weissenfluh was in the store partly because Livengood did not like to be in the store alone late at night. The store was well-lighted, even after closing, since several of the banks of lights were left lighted all night. There were large glass doors at the front of the store.

At approximately 12:10 a man entered the store, brandished a pistol and said, "This is a holdup." The robber took three stacks of currency from the counter top where Livengood was working. There had been 21 $1. bills, 9 or 11 $5. bills, and 3 $10. bills. The robber told Livengood to open the safe. Livengood opened the safe, and the robber removed a small, brown paper grocery bag filled with quarters from the safe.

The bandit ordered Livengood and Weissenfluh to the rear of the store to a walk-in cooler. After they had been in the rear of the store a short time, Weissenfluh said, "He's gone." Livengood went to the front of the store, but the robber was still there. The robber ordered Livengood to get back to the rear of the store and stay there or the robber would use the pistol. The robber put the pistol to Livengood's head and directed him to the rear of the store, threatening to pistol-whip him if he did not obey.

After a moment, Weissenfluh said, "He's gone, I'm sure he's gone this time." Livengood went up front again, got his pistol from under the counter, and looked for the robber. The robber was gone. Livengood went out front and saw the robber in the parking lot of a tavern across the street for only a brief moment.

Livengood called the police and reported the robbery,

then stayed on the telephone watching the parking lot across the street. He saw a car leave, then another that appeared to be driven by the robber. A police car pulled up at that moment and stopped the car pulling out of the parking lot. Livengood went over to the car and identified the driver as the robber. He was not wearing the overcoat he had worn in the store, and Livengood did not see the pistol.

Livengood described the robber's pistol as being about six inches long, .22 calibre, and old and worn. Livengood said that the robber wore dark trousers, a light-colored shirt, and an overcoat. The robber was about two to three feet away from Livengood. The robber was in the store a total of fifteen minutes, and of that time Livengood observed him all but two or three minutes.

Livengood identified Naughten at trial as the robber. The prosecutor asked, "Is there any doubt in your mind?"

Livengood responded, "None whatsoever."

On cross-examination, Livengood denied that he had viewed any lineups or any photospreads containing pictures of Naughten. Livengood denied talking about the case with anyone except for answering some questions for the deputy district attorney the day before the trial. Livengood admitted being with Weissenfluh the evening before his testimony, but denied discussing the case except to wonder how long it would last. Livengood said that he had never before testified in a case.

Weissenfluh testified as follows:

He was a shipping clerk, not employed at the Quickie Mart. On the night of the robbery he had been visiting with Livengood at the store since about 10:00 p.m. They planned to have a few beers after closing. At about 12:10, Weissenfluh was standing in front of the glass doors when Livengood said, "Turn around." When Weissenfluh turned, he saw a man with a gun who said, "Don't move." The robber picked up the money from the counter, put it in his coat pocket, then ordered Livengood to open the safe. The robber reached into the safe and removed something Weissenfluh could not identify.

The robber then marched Weissenfluh and Livengood to the cooler that covered the back wall. Weissenfluh thought he could see the store from the cooler and said, "He's gone." They both ran up front to get Livengood's pistol. The robber was not gone. The robber marched them back to the cooler with pistol in Livengood's neck. He threatened to pistol-whip Livengood.

Weissenfluh and Livengood waited until the robber left, then went up front. Livengood grabbed his gun from under the counter, Weissenfluh took it from him while Livengood got on the phone and called the police. Weissenfluh fired two shots at the fleeing robber. The robber went to a tavern parking lot across the street and Weissenfluh lost sight of him.

Weissenfluh saw one car leave the lot across the street, then the car apparently driven by the robber. Livengood described the car with the robber in it to

the police over the telephone. Just as the robber's car was emerging from the lot, two police cars arrived and arrested the three occupants. Weissenfluh identified the driver as the robber. Although Weissenfluh could only see the head of the driver of the car, he had no difficulty in identifying him. As Weissenfluh said, "When someone sticks a gun in my ribs, I don't forget their face."

Weissenfluh testified that the robber wore slacks, shirt and tweedy sport coat or car coat. He identified the pistol as a long-barreled .22 calibre. When the prosecutor asked Weissenfluh if the robber were in the court, Weissenfluh identified Naughten.

"Q Is there any douiot in your mind?

"A No, there's not, no doubt whatsoever."

On cross-examination, some inconsistencies developed between Livengood's testimony and Weissenfluh's. Livengood had testified that he had seen Weissenfluh at the police station when he went to sign a complaint. Weissenfluh denied ever having been in the police station. Weissenfluh stated that he had spent the night before testifying in Livengood's hotel room. (Livengood had moved away from Portland.) Livengood had testified that they had only played pool the evening before. Livengood testified that he wanted Weissenfluh in the store for protection late in the evening. Weissenfluh said he was only there because he and Livengood were going to have a few beers later in the evening.

In addition to Weissenfluh and Livengood, two uniformed police officers and one detective testified. The

officers testified that they had received a radio call to go to the Quickie Mart since there was a robbery in progress. They received a description of the car that Livengood thought he had seen the robber driving. As the officers arrived, they saw a car matching the description pull out of the tavern parking lot across the street. They pulled over the car and arrested all three occupants. One of the men identified Naughten, the driver, as the robber. Naughten was placed in the rear of one of the police cars. One of the officers saw Naughten attempting to conceal money in the crack of the seat of the police car. Naughten had his hands cuffed behind his back, and he was pulling the money from his right rear pants pocket and stuffing it into the crack. The officers seized the money and found 21 one dollar bills, eleven five dollar bills, and three ten dollar bills.

Naughten was not wearing a coat, and a search of him and the car he was driving revealed no pistol. However, in searching the parking lot, the officers did find a bag of quarters near the rear door of the tavern.

A detective on the case was not able to add much except to identify the clothes taken from Naughten the night of the robbery, and to testify that he had ordered the store dusted for fingerprints.

Naughten offered no witnesses in his own defense.

From the foregoing we see precious little discrepancies in the testimony—only the slight variances that tend to confirm veracity of two witnesses to the same event.

Obviously, under *Chapman v. California*, 386 U.S. 18

(1967) and *Harrington v. California*, 395 U.S. 250 (1969), we can say beyond a reasonable doubt the alleged error was harmless.

In a case so harmful to delicate state-federal relations we ought to take the case en banc. Cf. *Leiter Minerals v. United States*, 352 U.S. 220 (1957).

It is clear the federal courts now on direct appeal, where objection was made timely in lower courts, usually reverse on the instruction. But I am unconvinced that the point rises to constitutional dimensions. The inept instruction obviously comes from Mathes and Devitt, Federal Jury Practice and Instructions § 72.01 (1965), and we must assume it has been given thousands of times.

This sort of thing should be left to the states when it is a state case.

Circuit Judge Goodwin concurs in the foregoing expressed dissent.

ORDER GRANTING CERTIORARI

SUPREME COURT OF THE UNITED STATES

HOYT C. CUPP, Superintendent, Oregon State Penitentiary,

Petitioner,

v.

HUGH KYLE NAUGHTEN,

Respondent.

No. 72-1148

[April 23, 1973]

The motion of respondent for leave to proceed in *forma pauperis* and the petition for a writ of certiorari are granted.